

TAN AH KOW

a

v.

PUBLIC PROSECUTOR

HIGH COURT SABAH & SARAWAK, KUCHING

PUAN ELIZABETH CHAPMAN JC

b

[CRIMINAL APPEAL NO: 42-09-96-III]

27 JUNE 1996

**CRIMINAL PROCEDURE:** *Judgment - Grounds of decision - Delay in supplying - Three years and five months - Effect on Judge and judgment - Whether justifiable - Whether a ground for setting aside conviction and sentence - Principle of fair trial - When to apply principle rigorously.*

c

**CRIMINAL PROCEDURE:** *Appeal - Appeal against conviction and sentence - Grounds of appeal - Excessive delay by trial Judge in supplying grounds of decision - Oral evidence of witness contradicting her own medical report - New evidence adduced by prosecution in re-examination - Admission of hearsay evidence.*

d

**CRIMINAL LAW:** *Penal Code, s. 376 - Rape - Appeal against conviction and sentence - Excessive delay in supplying grounds of decision - Medical examiner's oral evidence deviating from her own report - Adduction of fresh evidence through the back door - Admission of hearsay evidence.*

e

**EVIDENCE:** *Parol evidence rule - Conflicting evidence - Evidence Act 1950, ss. 91 & 92 - Rape trial - Oral testimony of medical examiner deviating from her own medical report - Whether permissible in law - Whether a miscarriage of justice.*

f

**EVIDENCE:** *Fresh or further evidence - New evidence adduced in re-examination - No reference to such evidence in cross-examination - Whether a 'back door' approach - Whether accused prejudiced - Whether Court has duty to exclude although not objected to by defence.*

g

**EVIDENCE:** *Hearsay - Statement made by person not called - Whether admissible as evidence of truth of assertions contained therein - Whether amounted to a non-direction - Whether a misdirection - Whether a failure of justice.*

h

**EVIDENCE:** *Witness - Failure of prosecution to call witness - Whether s. 114(g) of Evidence Act 1950 could be invoked - Whether trial Judge should consider.*

The appellant was charged for rape under s. 376 of the Penal Code in the Sessions Court, and was convicted and sentenced to five years' imprisonment. The chronology of events which led up to his present appeal were as follows:

i

- a* The appellant was accused of raping his Indonesian maid ('the complainant') on 31 May 1990. The matter was reported to the police on 6 June 1990, and the appellant was arrested on 6 September 1990. The trial commenced on 19 May 1992, and after four adjournments, was concluded on 29 September 1992. The appellant was convicted on 29 October 1992. The Sessions Court Judge stated in the record of appeal that his grounds of decision would be furnished later. The appellant filed his notice of appeal on 30 October 1992, but his petition of appeal was only filed on 23 March 1996 - after the receipt of the grounds of decision.
- b*

**Held:**

- c* [1] The Sessions Court Judge's delay in supplying his grounds of judgment which was undated, and in which no cases were cited, came up to three years and five months after the appellant had filed his notice of appeal. There was no good reason or justifiable excuse for such a delay. The time factor alone would suggest that the learned Sessions Court Judge could not remember everything that took place at the trial as well as the demeanour of the witnesses. This excessive delay in supplying the grounds of decision was intolerable and had made an utter farce of the proper and expeditious administration of justice. The principle of fair trial should be applied even more rigorously where the excessive delay is caused not by the prosecution but by the trial Court itself.
- d*
- e*
- f* [2] The Sessions Court Judge had erred in preferring the evidence of the medical officer who examined the complainant. The oral testimony of this witness was clearly inconsistent with the medical report she had prepared after examining the complainant. Her oral testimony was clearly a contradiction and a deviation from her own medical report, and this is clearly not permissible in law. The acceptance of the oral testimony which deviated in material particulars from the medical report had contravened ss. 91 & 92 of the Evidence Act 1950 ('the Act'), thereby resulting in a miscarriage of justice.
- g*
- h* [3] The Sessions Court Judge had wrongfully allowed the prosecution to adduce additional evidence at the re-examination stage when they were not referred to in cross-examination. This was most prejudicial to the appellant. To allow the introduction of such evidence at that stage was to allow through the back door evidence suggesting that the appellant was trying to hush up the matter. The Court is under a duty to stop the introduction of fresh evidence at this stage whether or not there was any objection from the defence.
- i* [4] This additional evidence adduced at the re-examination stage was also inadmissible as it infringed against the rules pertaining to hearsay evidence. The persons who were alleged to have uttered the material words to the prosecution's witness were never called as witnesses, nor were they

offered to the defence. Thus, the truthfulness and accuracy of their alleged utterances were not tested under cross-examination. It is trite law that a statement made by a person not called as a witness is inadmissible to prove the truth of the facts stated therein. The failure of the Sessions Court Judge to direct himself properly according to the rules pertaining to hearsay was a non-direction which amounted to a misdirection, thereby occasioning a failure of justice.

[5] In the above connection, the Sessions Court Judge could also have considered invoking s. 114(g) of the Act against the prosecution for its failure to call the said witnesses.

*[Appeal allowed. Conviction and sentence quashed.]*

**Cases referred to:**

*Wong Kok Keong v. Regina* [1944] 21 MLJ 13 (*refd*)

*Teper v. R* [1952] AC 48 (*refd*)

*Public Prosecutor v. Tan Kok An* [1966] 2 CLJ 96 (*refd*)

*Tan Hun Wah v. Public Prosecutor & Anor.* [1994] 2 CLJ 180 (*foll*)

**Legislation referred to:**

Evidence Act 1950, ss. 114(g), 91, 92

Penal Code, s. 376

*For the appellant - Anthony Tai; M/s. Anthony Tai Advocate*

*For the respondent - Ahmad Zubir Jantan, DPP*

**JUDGMENT**

**Elizabeth Chapman JC:**

The appellant was charged for rape under s. 376 of the Penal Code in the Sessions Court. He was convicted of the said charge and was sentenced to five years' imprisonment. Briefly, the facts are these:

He was accused of raping his Indonesian maid on 31 May 1990. The matter was reported to the police on 6 June 1990, a lapse of six days after the incident. Complainant was brought for medical examination and was examined by Dr. Adida Noor Hashim (PW3), a medical officer attached to the General Hospital Kuching on 6 June 1990. The appellant was arrested on 6 September 1990, some three months later. The trial commenced on 19 May 1992 and continued until 21 May 1992. After an adjournment it proceeded on 19 June 1992 and on 6 July 1992 the prosecution closed its case. On 10 July the appellant gave evidence after which the case was adjourned to 13 July for continuation of hearing. After another two adjournments the case was finally concluded on 29 September 1992 when submissions were made. On 29 October 1992 the Court convicted the appellant. It is pertinent to note here from the record of appeal that the presiding Sessions Court Judge said that his written grounds of decision would be furnished later.

- a* The appellant filed the notice of appeal on 30 October 1990 and it was only on 23 March 1996 that the petition of appeal was filed after receipt of the grounds of decision. It is pertinent to note that the grounds of judgment though duly signed was undated. There was a delay of over three years from the date of the filing of the notice of appeal to the date when the grounds of decision was supplied. I will deal with this later. For the present moment I shall deal with two other grounds of appeal which, in my view, merit serious consideration.

- c* The first ground is that the lower Court erred in preferring the evidence of PW3, Dr. Adida Noor Hashim to that of DW2, Dr. David Ting. PW3, in her testimony, told the Court that she examined the complainant who alleged to have been raped on 6 June. On a general examination of the complainant she did not find any evidence of injury but on examination of the vagina she found three tears on her hymen. According to PW3 the tears were not fresh and they had been sustained more than forty-eight hours before and she further defined **'not fresh tears'** to mean more than twenty-four hours old. She further testified that at the time of examination the tears were still sore and that they were not sustained **'to the extent of one year ago but I think about a week ago'**. She further testified that the tears were most probably caused by forced penetration of the vagina and she further said **'I think they were caused by penile penetration. Most probably the penetration were from the front.'**

- f* In cross-examination PW3 told the Court that the tears could also have been caused by the penetration of fingers being forced in. She also said that in her opinion the complainant did not have sexual intercourse before this occasion. It is relevant to examine the medical report, exhibit P2A where PW3 described in the report that the tears were **'old tears'** and that in her opinion there was evidence of penetration of penis. Yet in her oral testimony before the Court she described the tears as not fresh and sustained about a week ago. This oral testimony of PW3 is clearly inconsistent with the medical report prepared by her after examination of the complainant.

- g* DW2, Dr. David Ting, an obstetrician and gynaecologist was called to give evidence and his evidence, in my view, deserves serious consideration. In his testimony DW2 said that in a rape case the patient should, normally, be examined by the doctor within the first twenty-four hours and that after three to four days it would be difficult to establish whether the tear was fresh or not fresh. Furthermore, after five to seven days it would no longer be possible to tell the age of the tear because the tear would have healed although the tear would still be there as it would be permanent. He further testified that it would not be possible to tell whether the victim was a virgin by looking at the old tear and that if the victim was examined five days after the intercourse it would not be possible to tell whether that was the first time intercourse had taken place. If there was resistance from the victim there would generally

be some external injuries such as bruises from the elbow, bruises from the lateral aspect of the legs and scratches to the inner thighs. And if there was difficulty of penetration the vulva would be traumatised. DW2, furthermore, told the Court that the opinion expressed in exhibit P2A that there was penetration of penis was a bit far-fetched as normally the only evidence one could put forward in such a case is the presence of sperm in the vagina otherwise one would not state that there was penetration of the penis for it can be penetration of any hard object such as fingers. One could only say there was penetration of the penis if there was a laboratory report of the presence of spermatozoa.

DW2 further testified, under cross-examination, that without the presence of sperm he would not state it was penile penetration and neither would the position of the tears indicate whether the penetration was by a penis or other object. He further said that the tears would normally heal by four or five days and it was most unlikely that the tears would still be sore.

In the grounds of decision the learned Sessions Court Judge referred to DW2's evidence as a generalised statement and it is obvious from his grounds of decision that he took the view that DW2 did not examine the complainant whereas PW3 did. It is further noted that the Court below placed undue emphasis on PW3's testimony that the tears were not fresh meaning they were sustained more than forty-eight hours. He went on to say in his grounds of decision that PW3 did not **"on the other hand, say they were old tears only that they were not fresh."**

An examination of exhibit P2A or perusal of P2A reveals beyond doubt that in her medical report PW3 stated that the tears were **'old tears'**. Her oral testimony is clearly a contradiction and a deviation from her own medical report and is clearly not permissible in law. The oral testimony which deviated in material particulars from the medical report contravenes s. 91 and s. 92 of the Evidence Act, 1950 thereby resulting in a miscarriage of justice: *Wong Kok Keong v. Regina* [1944] 21 MLJ 13.

It is also my considered opinion that had the learned Sessions Court Judge given due consideration to the evidence of DW2, particularly his evidence pertaining to the presence of spermatozoa before one could say there was penile penetration, the result might have been different. In this case PW3 had clearly contradicted her own medical report by her oral testimony.

The other ground of complaint is that the learned Sessions Court Judge had wrongfully allowed the prosecution to adduce additional matters at the re-examination stage when they were not referred to in cross-examination. This can be seen on page 18 of the record of appeal where the prosecution went on to adduce additional evidence from PW5 during the re-examination and the additional evidence adduced during the re-examination stage was most prejudicial

- a* to the appellant. It touched on the appellant's sister and her husband going to the appellant's house to discuss with the complainant the proposal of marriage.

- b* According to PW5 the appellant's sister and her husband had gone to his office to tell him that if all parties were agreeable to the marriage the complainant could go back to her kampong and there was no need for any further development of the case. At no time was the appellant's sister and brother-in-law called as witnesses and neither were they offered to the defence. The Court, in my view, is under a duty to stop the introduction of fresh evidence at this stage whether or not there was any objection from the defence. Additional evidence adduced in this case was, furthermore, inadmissible as it
- c* infringed against the rule pertaining to hearsay evidence. The truthfulness and accuracy of the evidence whose words are alleged to have been spoken to another witness were not tested by cross-examination in this instant case and it is trite law that a statement made by a person not called as a witness is inadmissible to prove the truth of the fact stated. See: *Teper v. R* [1952] AC 48; *Public Prosecutor v. Tan Kok An* [1966] 2 CLJ 96.
- d*

- e* The failure of the Sessions Court Judge to direct itself properly to the rules pertaining to hearsay is a non-direction which amounts to a misdirection thereby occasioning a failure of justice. To allow the introduction of such evidence at this stage is to adduce through the back door evidence suggesting that the appellant was trying to hush up the matter.

I now come to the main ground of appeal, which is, the delay in delivering the grounds of decision.

- f* In this case, the delay came up to three years and five months between the date of filing the notice of appeal and the time when the grounds of decision was supplied. Such a delay cannot be justified. The time factor alone would suggest that the learned Sessions Court Judge could not remember everything that took place at the trial as well as the demeanour of the witnesses. I do not see any complicated issue or complex point of law in this case. No cases
- g* were cited in the judgment which was undated. I can find no good reason or justifiable excuse for the delay. If the learned Sessions Court Judge had written the grounds of decision earlier perhaps he would have noticed the inconsistencies between PW3's evidence and that of her medical report, exhibit P2A. As is the case here no consideration was given at all to the medical
- h* report and, indeed, he took into consideration the inadmissible evidence adduced at the re-examination stage but at the same time forgetting that this piece of evidence was not supported at all by the complainant's evidence and neither did the Sessions Court Judge take into consideration that the sister and brother-in-law were not called to give evidence although he took into consideration
- i* that this inadmissible evidence would suggest an attempt by the appellant's family to try to cover up the crime. There was nothing on record why they were not called or why they were not made available. Surely the Court should

consider that failure to call these two important witnesses would justify the Court into considering whether s. 114(g) of the Evidence Act should be invoked. *a*

As stated in *Tan Hun Wah v. Public Prosecutor & Anor.* [1994] 2 CLJ page 180 the Court held that: *b*

There are many causes of delay, and the delay itself can take the form of an abuse of process or may appear in various forms of prejudice or unfairness. To obtain a permanent stay of prosecution, the application must be based on actual prejudice or unfairness and not merely 'presumptive prejudice'. The principle of fair trial should be applied even more rigorously where the excessive delay is caused not by the prosecution but by the trial Court itself. *c*

Likewise, in this case, the excessive delay in supplying the grounds of decision was intolerable and had made an utter farce of the proper and expeditious administration of justice and the delay must have contributed to the Court taking into consideration hearsay evidence whilst giving no consideration at all to the documentary evidence, that is, exhibit P2A. *d*

For the reasons stated above the appeal is allowed and the conviction and sentence of the lower Court are accordingly quashed.

Reported by Gan Peng Chiang *e*

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